Supreme Court, U.S.
FILED

01 936 JAN - 2 2002

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

MARY PAMELA BESSER AND
RICHARD GREEN,

Petitioners,

v.

KENNETH E. HARDY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

HOLLAND N. MCTYEIRE, V
MELISSA NORMAN BORK
GREENEBAUM DOLL
& MCDONALD PLLC
3300 National City Tower
101 South Fifth Street
Louisville, KY 40202
(502) 589-4200

JOHN G. ROBERTS, JR.*
JONATHAN S. FRANKLIN
MICHAEL R. GRYNBERG
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Petitioner

77 pp

QUESTION PRESENTED

Whether the Sixth Circuit correctly held—in conflict with the rule in the Third, Fourth, and Fifth Circuits—that First Amendment protection extends to a state college instructor's classroom speech when the instructor is speaking as an employee of the college.

PARTIES TO THE PROCEEDINGS

Petitioners Mary Pamela Besser and Richard Green were defendants in the District Court and appellants before the United States Court of Appeals for the Sixth Circuit. Besser was Acting Dean and Green was President of Jefferson Community College ("JCC") at the time of the events at issue. JCC and the Kentucky Community and Technical College System were also defendants in the District Court.

Respondent Kenneth Hardy was plaintiff before the District Court and appellee before the United States Court of Appeals for the Sixth Circuit.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
I. THE COURTS OF APPEALS ARE DIVIDED ON THE IMPORTANT AND RECURRING QUESTION OF WHETHER A TEACHER'S CLASSROOM SPEECH IS PROTECTED BY THE FIRST AMENDMENT	8
II. THE QUESTION PRESENTED IS IMPORTANT AND SHOULD BE DECIDED BY THIS COURT	20
CONCLUSION	23

TABLE OF CONTENTS

Page

APPENDICES

Appendix A:	Opinion of the Court of Appeals, dated August 15, 2001	1a
Appendix B:	Memorandum Opinion of the District Court, dated December 15, 1999	21a
Appendix C:	Order of the District Court, dated December 15, 1999	30a
Appendix D:	Memorandum Opinion of the District Court, dated January 26, 2000	32a
Appendix E:	Order of the District Court, dated January 26, 2000	36a
Appendix F:	Memorandum Opinion and Order of the District Court, dated February 1, 2000	38a
Appendix G:	Order Denying Rehearing, dated October 4, 2001	41a

TABLE OF AUTHORITIES

Page

Cases:

Arnett v. *Kennedy*, 416 U.S. 134 (1974) 2

Bishop v. *Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992) 15, 17

Blum v. *Schlegel*, 18 F.3d 1005 (2d Cir. 1994) 14

Board of Educ. of Jefferson County Sch. Dist. R-1 v. *Wilder*, 960 P.2d 695 (Colo. 1998) 20

Board of Regents of Univ. of Wis. Sys. v. *Southworth*, 529 U.S. 217 (2000) 21

Bonnell v. *Lorenzo*, 241 F.3d 800 (6th Cir.), *cert. denied*, 122 S. Ct. 347 (2001) 6

Boring v. *Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir.), *cert. denied*, 525 U.S. 813 (1998) 11

Bradley v. *Pittsburgh Bd. of Educ.*, 910 F.2d 1172 (3d Cir. 1990) 8, 11, 12

Braxton v. *United States*, 500 U.S. 344 (1991) 10

Burnham v. *Ianni*, 119 F.3d 668 (8th Cir. 1997) 17

California Teachers Ass'n v. *State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001) 3, 15

TABLE OF AUTHORITIES

Page

Cases:

Clark v. *Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973) 13

Cockrel v. *Shelby County Sch. Dist.*, 270 F.3d 1036 (6th Cir. 2001) ..... *passim*

Cohen v. *San Bernardino Valley College*, 883 F. Supp. 1407 (D.C. Cal. 1995), *rev'd in part on other grounds*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997) 19

Connick v. *Myers*, 461 U.S. 138 (1983) ..... *passim*

Conward v. *Cambridge Sch. Comm.*, 171 F.3d 12 (1st Cir. 1999) 16

Dambrot v. *Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) 6, 7, 8

DiBona v. *Matthews*, 269 Cal. Rptr. 882 (Ct. App.), *cert. denied*, 498 U.S. 998 (1990) 20

Edwards v. *California Univ. of Pa.*, 156 F.3d 488 (3d Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999) 3, 8, 12, 17

Fisher v. *Fairbanks North Star Borough Sch. Dist.*, 704 P.2d 213 (Alaska 1985) 20

TABLE OF AUTHORITIES

Page

Cases:

Green Township Educ. Ass'n v. *Rowe*, 746 A.2d 499 (N.J. Super. Ct. 2000) 19

Hazelwood Sch. Dist. v. *Kuhlmeier*, 484 U.S. 260 (1988) 9, 15, 16

Hennessy v. *City of Melrose*, 194 F.3d 237 (1st Cir. 1999) 14

Hosford v. *School Comm. of Sandwich*, 659 N.E.2d 1178 (Mass. 1996) 20

Jeffries v. *Harleston*, 21 F.3d 1238 (2d Cir.), *vacated and remanded*, 513 U.S. 996 (1994) 8

Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) 7, 17

Kirkland v. *Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) 8, 12, 13

Lacks v. *Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718 (8th Cir. 1998), *cert. denied*, 526 U.S. 1012 (1999) 16

LeVake v. *Independent Sch. Dist. #656*, 625 N.W.2d 502 (Minn. Ct. App. 2001), *petition for cert. filed*, 70 U.S.L.W. 3340 (U.S. Oct. 22, 2001) No. 01-655 19

TABLE OF AUTHORITIES

Page

Cases:

Levin v. *Harleston*, 966 F.2d 85 (2d Cir. 1992) 8

Miles v. *Denver Pub. Schs.*, 944 F.2d 773 (10th Cir. 1991) 16, 17

Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 6

Parate v. *Isibor*, 868 F.2d 821 (6th Cir. 1989) 16

Piarowski v. *Illinois Cmty. College Dist. 515*, 759 F.2d 625 (7th Cir.), *cert. denied*, 474 U.S. 1007 (1985) 21

Pickering v. *Board of Educ.*, 391 U.S. 563 (1968) ....*passim*

Rosenberger v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) 8-9, 12, 21

Silano v. *Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719 (2d Cir. 1994), *cert. denied*, 515 U.S. 1160 (1995) 16

Silva v. *University of N.H.*, 888 F. Supp. 293 (D.N.H. 1994) 19

Sweezy v. *New Hampshire*, 354 U.S. 234 (1957) 17

Terrell v. *University of Texas Sys. Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987) 13

TABLE OF AUTHORITIES

Page

Cases:

United States v. *National Treasury Employees Union*, 513 U.S. 454 (1995) 10

Urofsky v. *Gilmore*, 216 F.3d 401 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) ..... *passim*

Vega v. *Miller*, __ F.3d__, 2001 WL 1518273 (2d Cir. 2001) 3

Constitutional Provisions, Statutes, and Rules:

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XI 5-6

U.S. Const. amend. XIV 5

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 ..... 2, 5

S. Ct. Rule 10 10

Other Authorities:

J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251 (1989) 18-19

TABLE OF AUTHORITIES

Page

Other Authorities:

Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. Rev. 693 (1990) 6

Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & Educ. 1 (2001) 18, 19

Rachel E. Fugati, Comment, *Choppy Waters Are Forecast for Academic Free Speech*, 26 Fla. St. U.L. Rev. 187 (1998) 18

Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 Tenn. L. Rev. 597 (1999) 18

IN THE

Supreme Court of the United States

No. 01-

MARY PAMELA BESSER AND
RICHARD GREEN,

Petitioners,

v.

KENNETH E. HARDY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Mary Pamela Besser and Richard Green respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 260 F.3d 671 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court addressing the First Amendment issue is not reported and is reprinted at App. 21a.

JURISDICTION

The judgment of the Sixth Circuit was entered on August 15, 2001. App. 1a. A timely petition for rehearing and rehearing en banc was denied on October 4, 2001. *Id.* 41a-42a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * ."

Section 1983 of Title 42, United States Code, provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * * ."

INTRODUCTION

This petition asks the Court to resolve a deepening conflict among the courts of appeals respecting the First Amendment protection afforded to classroom speech by publicly employed teachers. Kenneth Hardy alleges that his teaching contract was not renewed because of his pedagogical use of offensive language and that the non-renewal therefore violated the First Amendment. The Sixth Circuit evaluated Hardy's claim under the balancing test set forth in *Connick* v. *Myers*, 461 U.S. 138 (1983) and *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and held that Hardy's classroom use of offensive language touched on a matter of public concern and merited First Amendment protection.

The Sixth Circuit's holding conflicts with the holdings of other courts of appeals that foreclose First Amendment protection for a teacher's classroom speech when that speech is related to the teacher's employment responsibilities. These cases hold that teachers acting in their professorial capacity do not speak as private citizens but rather as public employees, *see, e.g.*, *Urofsky* v. *Gilmore*, 216 F.3d 401, 409 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001), that the First Amendment does not grant individual teachers control over the curriculum, *see, e.g.*, *Edwards* v. *California Univ. of Pa.*, 156 F.3d 488, 491-492 (3d Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999), and that "academic freedom"—insofar as it exists as a distinct First Amendment category—defines protections afforded to educational institutions, rather than to their employees. *Urofsky*, 216 F.3d at 414-415.

The circuit courts themselves have expressly acknowledged the conflict. *See, e.g.*, *Cockrel* v. *Shelby County Sch. Dist.*, 270 F.3d 1036, 1050-52 (6th Cir. 2001) (criticizing and declining to follow Fourth and Fifth Circuit holdings); *California Teachers Ass'n* v. *State Bd. of Educ.*, 271 F.3d 1141, 1148-49 & n.6 (9th Cir. 2001) (noting "different tests" employed by circuit courts and that "[n]either this court nor the Supreme Court has definitively resolved whether and to what extent a teacher's instructional speech is protected by the First Amendment"). The proliferation of approaches to the issue of classroom speech is provoking increasing confusion in the courts of appeals. *See Vega* v. *Miller*, ___ F.3d ___, 2001 WL 1518273, at *7 (2d Cir. Nov. 29, 2001) (in light of conflicting precedents, concluding that termination of teacher who permitted students to shout vulgarities during classroom exercise did "not violat[e] his clearly established First Amendment academic freedom rights"). This Court should resolve the Question Presented to ensure uniform application of the First Amendment throughout the Nation.

STATEMENT OF THE CASE

Kenneth Hardy joined the faculty of Jefferson Community College ("JCC") in January 1995 as an adjunct instructor in the communications program. Between January 1995 and May 1998, the college renewed Hardy's contract each semester. Hardy alleges that he was told in May 1998 that he would be assigned classes in the fall semester, but he did not sign a contract at that time. App. 2a-3a.

During the summer semester of 1998, Hardy conducted a class on language and social constructivism in his "Introduction to Interpersonal Communication" course. The session's purpose was to examine the use of language in marginalizing certain social groups. The class discussed a variety of words suggested by the students, including "girl," "lady," "faggot," "nigger," and "bitch." *Id.* 3a.

One of Hardy's female African-American students objected to the in-class use of the words "nigger" and "bitch" and complained to both Hardy and JCC officials. She believed that the exercise contradicted the policy set forth in the course syllabus, that "[i]n order to make all class members comfortable enough to participate, there will be no abusive (i.e. sexist, racist, otherwise derogatory) language in discussion." *Id.* Shortly after the student registered her complaint, Reverend Louis Coleman, a local civil rights activist, met with College President Richard Green to discuss the matter and request corrective action. *Id.* 3a-4a. On July 21, 1998, Hardy met with Acting Dean Mary Pamela Besser, who questioned his use of the word "nigger" in class and told Hardy about Reverend Coleman's concern. *Id.* 4a. On August 23, Hardy was informed by mail that the matter had been satisfactorily resolved. Hardy finished teaching the summer session, but was advised in late August that there were no classes for him to teach in the Fall 1998 semester. He has not since been invited back to teach at JCC. *Id.* 4a-5a.

On July 23, 1999, Hardy filed a complaint that asserted state and federal claims against JCC, the Kentucky Community and Technical College System, Besser, and Green. Hardy charged that Besser and Green had retaliated against him for exercising his rights of "free speech and academic freedom," thus violating 42 U.S.C. § 1983 by depriving him of his rights under the First and Fourteenth Amendments. *Id.* 5a. Besser and Green sought dismissal on qualified immunity grounds, contending that the First Amendment did not protect Hardy's use of vulgarity in the classroom, and that in any event such a right was not clearly established. The District Court denied the motion, holding that Hardy had alleged facts stating a First Amendment retaliation claim. *Id.* 26a-27a.

Under the test set forth in *Connick* v. *Myers*, 461 U.S. 138 (1983) and *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), a public employee wishing to state a First Amendment retaliation claim must demonstrate that he was disciplined for speech directed to a matter of public concern and that his interest in speaking outweighed the state's interest in promoting the efficiency of its services. *Pickering*, 391 U.S. at 568. The District Court held that Hardy's use of epithets in an "academic context and setting" qualified under this test as protected speech that touched on a matter of public concern. App. 26a. In the absence of a developed factual record, the court did not proceed to the second prong and balance Hardy's First Amendment interest against JCC's efficiency interests. The court further concluded that Besser and Green were not entitled to qualified immunity because "the right of public employees to comment on matters of public concern has been clearly established by Supreme Court precedent for many years." *Id.* 27a.[1]

---

[1] Hardy also asserted Section 1983 claims against JCC, the Kentucky Community and Technical College System, and Besser and Green in their official capacities. These claims were initially deferred by the District Court, but ultimately dismissed on Elev-

Besser and Green appealed the denial of qualified immunity, *see Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985), and the Sixth Circuit affirmed. On the threshold matter of whether Hardy's use of offensive language was entitled to First Amendment protection, the Sixth Circuit held that Hardy could state a First Amendment retaliation claim for classroom speech made while teaching on JCC's behalf. Citing a student law review note, the court declared that "[b]ecause the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.' " App. 11a-12a (citing Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. Rev. 693, 702 (1990)). The court distinguished two Sixth Circuit precedents that had denied First Amendment protection to instructors, noting that those cases involved speech that was not germane to the subject matter of a course. *Id.* 10a-11a (distinguishing *Bonnell* v. *Lorenzo*, 241 F.3d 800 (6th Cir.), *cert. denied*, 122 S. Ct. 347 (2001) and *Dambrot* v. *Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995)). Having concluded that classroom instruction may be protected under the First Amendment, the court determined that Hardy's lecture on social deconstructivism and language, though not "pure public debate," sufficiently related to matters of public concern to trigger the *Pickering* balancing test. *Id.* 12a.

---

enth Amendment grounds, save for Hardy's claims for prospective injunctive relief. App. 33a. The District Court also rejected Hardy's claims that the non-renewal of his contract violated his rights to due process and equal protection. *Id.* 25a, 27a.

The District Court dismissed Hardy's state law claims of defamation, tortious interference with contractual relationship, and breach of contract. *Id.* 28a-29a, 33a. Hardy's state law conspiracy claim remains alive based on the survival of his First Amendment retaliation count. *Id.* 28a.

The Sixth Circuit's treatment of Hardy's purported right to "academic freedom" confirmed the court's ruling that the First Amendment protected the teacher in the performance of his employment responsibilities. Although the panel raised the issue of academic freedom in its discussion of the second prong of the *Pickering* inquiry, *id.* 13a ("In balancing the competing interests involved, we must take into account the robust tradition of academic freedom in our nation's post-secondary schools."), it employed the concept to address the threshold question of whether Hardy's speech was eligible for First Amendment protection even though he spoke as a JCC employee while in the classroom. After quoting several of this Court's precedents discussing academic freedom, the court declared that

> In light of these precedents, the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive. * * * This circuit, following Supreme Court direction, has similarly held that a teacher's in-class speech deserves constitutional protection. [*Id.* 13a-14a.[2]]

---

[2] The court went on to rule that Besser and Green could not claim qualified immunity because Hardy not only had a First Amendment right but that right was clearly established. Operating at a high level of generality, the court declared that

> [t]here is no doubt that the right allegedly violated in this case, based on the freedom of speech protected by the First Amendment, is one of our most fundamental and established constitutional rights. For decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion, or intimidation that "cast a pall of orthodoxy" over the free exchange of ideas in the classroom. [App. 17a (quoting *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)).]

For the proposition that Hardy's First Amendment right was clearly established, the panel relied on *Dambrot* v. *Central*

Green and Besser filed a timely petition for rehearing and rehearing en banc, which was denied on October 4, 2001. App. 41a-42a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED ON THE IMPORTANT AND RECURRING QUESTION OF WHETHER A TEACHER'S CLASSROOM SPEECH IS PROTECTED BY THE FIRST AMENDMENT

The Sixth Circuit's decision exacerbates a persistent conflict among the circuits as to whether the First Amendment protects a teacher's classroom speech. On the one hand, the Third, Fourth, and Fifth Circuits have held that, under *Pickering*, public educational institutions reserve their right as employers to control the speech of teachers when they act as public employees—i.e., when their speech is related to the subject matter of their class. *See, e.g.*, *Urofsky* v. *Gilmore*, 216 F.3d at 407; *Edwards* v. *California Univ. of Pa.*, 156 F.3d at 491; *Bradley* v. *Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990); *Kirkland* v. *Northside Indep. Sch. Dist.*, 890 F.2d 794, 798-799 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990).

This Court captured the essence of the approach of these circuits in *Rosenberger* v. *Rector & Visitors of University of*

Michigan University, *supra*—a case *denying* First Amendment protection for offensive speech. The panel held that *Dambrot* nonetheless clearly established Hardy's right because it distinguished two Second Circuit cases that involved racially derogatory statements by college professors that were intended to influence public debate. App. 18a-19a. The court below did not address the fact that the Second Circuit cases involved *out-of-class* statements by the professors. *Dambrot*, 55 F.3d at 1189 (discussing *Levin* v. *Harleston*, 966 F.2d 85 (2d Cir. 1992); *Jeffries* v. *Harleston*, 21 F.3d 1238 (2d Cir.), *vacated and remanded*, 513 U.S. 996 (1994)).

Virginia, 515 U.S. 819, 833 (1995), explaining that "when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker * * * ." Thus, if the teacher's speech relates to his job as an instructor, it is speech the university may control. This view is also followed by other circuits, *see infra* Part I.C., but these courts have added to the confusion in the law by analyzing the issues under the standards set forth in *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), rather than those set forth in *Pickering*.

The court below took an opposite approach. It found the First Amendment implicated precisely *because* Hardy's offensive speech was "germane to the subject matter" of his class. App. 11a. Because Hardy's speech was germane to his topic, which related to matters deemed to touch on public concern, the court held that the first prong of *Pickering* was satisfied and a balancing of competing interests was required. As the court below put it, "[b]ecause the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.' " *Id.*

Since the decision below, the Sixth Circuit has explicitly acknowledged that its view that a teacher's classroom speech may touch on a matter of public concern, and therefore trigger First Amendment protection, conflicts with the rule in other circuits. *Cockrel* v. *Shelby County Sch. Dist.*, 270 F.3d at 1051 (criticizing and declining to follow position of "the Fourth and Fifth Circuits * * * that a teacher, in choosing what he will teach his students, is not speaking as a citizen, but rather as an employee on matters of private interest"). The conflict is particularly entrenched because the very same consideration—how closely the teacher's speech is related to

the subject matter of the class—causes some circuits to find First Amendment protection appropriate, while it causes other circuits to reach the opposite conclusion. This case therefore presents a proper candidate for review by this Court. *See* S. Ct. Rule 10; *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

A. In the Third, Fourth, and Fifth Circuits, public school teachers do not have a First Amendment right to carry out their classroom duties in a manner contrary to their employers' pedagogical or other objectives. Those circuits look to the teacher's role at the time of the speech at issue, and hold that First Amendment protection is not warranted where the speech is within the scope of the teacher's employment activities. The Fourth Circuit, for example, has ruled that the First Amendment does not apply to a broad range of teacher activities that might well constitute protected speech if undertaken outside of employment. In *Urofsky*, the en banc court rejected a First Amendment challenge by college professors to a Virginia statute that restricted state employees from accessing sexually explicit material on state owned or leased computers. The court held that the speech of a public employee does not touch on a matter of public concern—and therefore does not implicate the First Amendment—if the employee acts on the government's behalf when speaking. "The Supreme Court has made clear that the concern is to maintain for the government employee the same right enjoyed by his privately employed counterpart. To this end, * * * the Court has emphasized the *unrelatedness* of the speech at issue to the speaker's employment duties." 216 F.3d at 407 (emphasis added) (citing *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 465 (1995)).

The Fourth Circuit did not deny that the subject of the speech may be important, but nevertheless acknowledged

"the basic truth that speech by public employees undertaken in the course of their job duties will frequently involve matters of vital concern to the public, without giving those employees a First Amendment right to dictate to the state how they will do their jobs." *Id.* In the Fourth Circuit's view, it is necessary that the state retain control of its employees when they act on the state's behalf because "[i]t cannot be doubted that in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their positions in a specified way." *Id.* at 409. Applying its analysis to the plaintiff professors, the court concluded that they used state computers in their capacity as employees. Accordingly, a statute restricting such use did not run afoul of the First Amendment. *Id.*; *see also Boring* v. *Buncombe County Bd. of Educ.*, 136 F.3d 364, 369 (4th Cir.) (en banc) (holding that because teacher's dispute with administration and school board over contents of publicly performed play involved a curricular matter and was "nothing more than an ordinary employment dispute, it does not constitute protected speech and has no First Amendment protection"), *cert. denied*, 525 U.S. 813 (1998).

The Third Circuit, like the Fourth, finds the First Amendment inapplicable when a teacher's speech relates to his employment duties. *Bradley* v. *Pittsburgh Board of Education*, *supra*, involved a tenured high school teacher's desire to employ a particular teaching methodology, known as "Learnball." The court held that the teacher's academic freedom did not extend to curricular choices or classroom management techniques, and rejected the application of the *Pickering* balancing test to her in-class conduct. "Although a teacher's *out-of-class* conduct, including her advocacy of particular teaching methods is protected, * * * her *in-class* conduct is not." 910 F.2d at 1176 (emphases added). Contrary to the Sixth Circuit's view of the law, under the

Third Circuit's approach it is unnecessary to consider whether the teaching method in question—Learnball in *Bradley*, explicit language here—poses any threat of disruption. The fact that the teacher is acting as an employee rather than as a citizen means that the First Amendment is not implicated.

The Third Circuit has applied the same distinction to a university professor who claimed that restrictions on course materials and class content violated his First Amendment rights. In *Edwards* v. *California University of Pennsylvania*, 156 F.3d at 491, the court "conclude[d] that a public university professor does not have a First Amendment right to decide what will be taught in the classroom." Quoting this Court's explanation in *Rosenberger*, 515 U.S. at 833, that " 'when the State is the speaker, it may make content-based choices,' " the court focused on the capacity of the teacher, explaining that he has fewer rights when acting on the state's behalf. *Edwards*, 156 F.3d at 491. "Since the University's actions in the instant case concerned the 'content of the education it provides,' we find that the University was acting as speaker and was entitled to make content-based choices in restricting [the plaintiff's] syllabus." *Id.* at 492 (citation omitted).

The Fifth Circuit has likewise recognized the distinction between citizen and employee in this context, holding that a teacher's speech implicates the First Amendment only if undertaken in the former role. In *Kirkland* v. *Northside Independent School District*, *supra*, the court rejected a probationary teacher's challenge to the non-renewal of his contract based on his use of a separate reading list. The court explained that the question turned on the capacity in which the plaintiff acted when speaking.

> [I]ssues do not rise to a level of "public concern" by virtue of the speaker's interest in the subject matter; rather, they achieve that protected status if the words or conduct

> are conveyed by the teacher in his *role as a citizen* and not in his *role as an employee* of the school district. [890 F.2d at 798-799 (emphases in original).[3]]

The court concluded that the plaintiff's constitutional claim did not advance beyond the threshold inquiry, determining that his use of a separate reading list was not a matter of public concern. *Id.* at 800.[4]

B. The approach of the Third, Fourth, and Fifth Circuits—emphasizing that the First Amendment is not implicated unless a teacher's speech is *unrelated* to the teacher's duties—is diametrically opposed to the decision below. The Sixth Circuit focused on the pedagogical nature of Hardy's speech, concluding that it was protected under the First

---

[3] The court also relied on the circuit's prior ruling in *Terrell* v. *University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987), which declared

> Because almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as a citizen or primarily in his role as an employee. [*Id.* at 1362 (emphasis in original).]

[4] The Seventh Circuit has likewise distinguished between educators speaking in their role as citizens and as teachers. *Clark* v. *Holmes*, 474 F.2d 928 (7th Cir. 1972) (per curiam), *cert. denied*, 411 U.S. 972 (1973), involved a teacher who had not been rehired based on his counselling of students and his teaching sex education in a health course. The Seventh Circuit rejected the teacher's claim that the action violated his First Amendment rights because "[plaintiff's] disputes with his superiors and colleagues about course content and counselling were not 'matters of public concern' and involved [plaintiff] as a teacher rather than as an interested citizen." *Id.* at 931. The court applied the same reasoning to the teacher's criticisms of his employers in front of the class. *See id.*

Amendment because it related to his employment as an instructor. App. 10a-11a (distinguishing earlier Sixth Circuit precedents because those cases had involved speech that was not germane to the subject matter of a course). Had the Third, Fourth, and Fifth Circuit rule applied below, Hardy could not have stated a claim. He was conducting a class on JCC's behalf as an employee, so his status when speaking would have precluded treating his speech as touching on a matter of public concern. *Contrast Cockrel*, 270 F.3d at 1051-52 (rejecting Fourth and Fifth Circuit holdings and stating Sixth Circuit position that teacher speech may touch on public concern even when teacher is speaking as an employee). Under the Sixth Circuit's view, Hardy's speech warranted First Amendment protection precisely *because* it was related to his employment.

The First and Second Circuits have similarly found that teachers' classroom speech may warrant First Amendment protection (although those circuits, as noted below, appear internally divided on the issue). In those circuits, like the Sixth Circuit, such speech can receive First Amendment protection when it touches on a matter of public concern, notwithstanding that the speech may be contrary to the employer's pedagogical objectives. *See, e.g.*, *Blum* v. *Schlegel*, 18 F.3d 1005, 1011-12 (2d Cir. 1994) (law professor's speech in classes implicated matters of public concern); *Hennessy* v. *City of Melrose*, 194 F.3d 237, 247 (1st Cir. 1999) (student teacher engaged in sufficiently protected expression during school activities to require balancing of interests in evaluating his termination).

There is thus a clear division in authority between the First, Second, and Sixth Circuits, which apply the *Pickering* balancing test to teacher speech in classroom settings, and the Third, Fourth, and Fifth Circuits, which as a threshold matter preclude First Amendment protection for teacher speech that is spoken as part of the teacher's job.

C. The conflict among the circuits is exacerbated by the fact that many circuits—including the Eighth, Tenth, and Eleventh—evaluate First Amendment protection for teacher classroom speech not under the *Pickering* framework but instead under that established by *Hazelwood*, *supra*, which permits editorial control over school-sponsored expression so long as the regulation is reasonably related to legitimate pedagogical concerns. Indeed, as the Sixth Circuit has recognized, the circuits are divided on which framework is appropriate. *See Cockrel*, 270 F.3d at 1055 n.7 ("Rather than apply *Pickering*, several circuits have chosen to apply the Supreme Court's analysis of students' in-class speech rights in *Hazelwood* * * * to cases in which teachers' in-class speech rights are at issue."); *see also California Teachers Ass'n* v. *State Bd. of Educ.*, 271 F.3d at 1149 n.6 (describing "different tests" employed by circuit courts "to analyze the free speech rights of teachers").

The circuits that have applied *Hazelwood* in situations akin to the present case are aligned with the view of the Third, Fourth, and Fifth Circuits that a school has substantial discretion in setting the scope of permitted speech by its employees. They thus stand in sharp contrast to the Sixth Circuit's lack of deference to the college's concern regarding the disruption caused by Hardy's speech. For example, in *Bishop* v. *Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992), the court looked to *Hazelwood* to reject a university professor's claim that a directive to refrain from interjecting religious beliefs into class or conducting optional classes to discuss topics from a Christian perspective violated his First Amendment rights. As the court explained, the plaintiff's "interest in academic freedom and free speech do not displace the University's interest inside the classroom." *Id.* at 1076.

The Eighth and Tenth Circuits have also adhered to that view, dismissing First Amendment claims of teachers where (as in this case) the alleged restriction on speech is reasona-

bly related to pedagogical concerns. *See Lacks* v. *Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 724 (8th Cir. 1998) (declaring, in upholding the termination of a teacher who allowed her students to use profanity, that a "flat prohibition on profanity in the classroom is reasonably related to the legitimate pedagogical concern of promoting generally acceptable social standards"), *cert. denied*, 526 U.S. 1012 (1999); *Miles* v. *Denver Pub. Schs.*, 944 F.2d 773, 778-779 (10th Cir. 1991) (upholding, on summary judgment, discipline of teacher for repeating rumor to class concerning students who were "making out" on a tennis court). Meanwhile, decisions of the First and Second Circuits have employed *Hazelwood* to reject First Amendment claims of teachers complaining of restrictions on classroom speech.[5] Thus, the First and Second Circuits are themselves divided on the question, with some decisions of those courts holding that teacher classroom speech can warrant First Amendment protection under *Pickering*, and others dismissing such claims under *Hazelwood*. This multiplicity of views only serves to heighten the confusion in the law.

D. The Sixth Circuit's invocation of "academic freedom" to bolster its ruling that the First Amendment applies to Hardy's speech also reflects a conflict among the circuits. App. 13a-14a; *see also Parate* v. *Isibor*, 868 F.2d 821, 830 (6th Cir. 1989) (observing that academic freedom "protect[s] the individual professor's classroom method from the arbitrary interference of university officials"). Most notably, the Fourth Circuit's en banc holding in *Urofsky* rejected the argument that university professors have the right to deter-

---

[5] *See Silano* v. *Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2d Cir. 1994) (upholding censure of guest lecturer who used depictions of bare-chested women to illustrate phenomenon of persistence of vision), *cert. denied*, 515 U.S. 1160 (1995); *Conward* v. *Cambridge Sch. Comm.*, 171 F.3d 12, 22-23 (1st Cir. 1999) (school could discipline teacher for handing a paper that contained improper language to a student).

mine the subject of their research, writing, or teaching such that they possess greater First Amendment protections than their fellow public employees. The Fourth Circuit extensively examined the historical and precedential background of the notion of academic freedom, *see* 216 F.3d at 409-415, observing that "decisions invoking academic freedom are lacking in consistency and courts often invoke the doctrine in circumstances where it arguably has no application." *Id.* at 410 (citations omitted). Like the *Hardy* panel, the *Urofsky* court focused on this Court's opinions in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957) and *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). Contrary to the Sixth Circuit in this case, however, the Fourth Circuit concluded that "[t]he Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an *institutional* right of self-governance in academic affairs." *Id.* at 412 (emphasis added). The conflict between the two circuits is particularly stark, since the Sixth Circuit invoked the concept of academic freedom to override the institution's determination on how to govern academic affairs.

Other recent precedents from the Third, Tenth, and Eleventh Circuits reach the same conclusion as the Fourth Circuit in *Urofsky* and refrain from giving the amorphous concept of academic freedom substance as an *individual* right. *See, e.g.*, *Edwards*, 156 F.3d at 492 (holding that teacher's interest in academic freedom does not trump college's); *Bishop* v. *Aronov*, 926 F.2d at 1075 ("Though we are mindful of the invaluable role academic freedom plays in our public schools * * * we do not find support to conclude that academic freedom is an independent First Amendment right."); *Miles* v. *Denver Pub. Schs.*, 944 F.2d at 779 ("[T]he caselaw does not support [plaintiff's] position that a secondary school teacher has a constitutional right to academic freedom."); *but cf. Burnham* v. *Ianni*, 119 F.3d 668, 680 n.19 (8th Cir. 1997) (en banc) (noting that its holding that the removal of profes-

sors' photos from display violated First Amendment was supported "in some respect" by the professors' academic freedom).

The Sixth Circuit's invocation of academic freedom to support extending constitutional protection to a teacher's classroom speech that is contrary to the pedagogical mission of his employer has thus heightened the circuit conflict. This Court should grant the writ to resolve that persistent conflict and clarify the proper role for considerations of academic freedom in such cases—as support for the teacher's individual claim or instead for the institution's prerogative to define and pursue its educational mission.

E. The circuit conflict on the question presented by this petition is direct and undeniable. It has been expressly acknowledged by the Sixth Circuit, *Cockrel*, 270 F.3d at 1051, and by numerous commentators as well. *See, e.g.*, Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & Educ. 1, 6 (2001) ("The Supreme Court has yet to squarely address what level of protection, if any, should be accorded to teachers' in-class speech. * * * The Supreme Court's abstention has fostered divergent approaches in the lower courts, as well as a general lack of certainty about the parameters of teachers' free speech rights."); Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 Tenn. L. Rev. 597, 602 (1999) ("[T]here is currently a split among the circuit courts on the appropriate test for resolving teachers' in-class speech issues"); Rachel E. Fugate, Comment, *Choppy Waters Are Forecast for Academic Free Speech*, 26 Fla. St. U. L. Rev. 187, 203 (1998) ("Lower courts have not developed a consistent test to be applied to a professor's speech in the classroom because the Supreme Court has not addressed the level of protection that such speech demands."); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251, 252-253 (1989) ("Attempts to understand the scope and

foundation of a constitutional guarantee of academic freedom * * * generally result in paradox or confusion. The cases, shorn of panegyrics, are inconclusive, the promise of their rhetoric reproached by the ambiguous realities of academic life.").

The commentary has observed that the proliferation of approaches in the courts below is tied to the threshold uncertainty raised by this petition—whether the First Amendment applies to an instructor speaking on his school's behalf. "These variations can be collapsed into one major difference that splits the circuits—ultimately each court strikes a different balance in allocating power over educational decision-making between teachers and school administrators." Daly, *supra*, at 17.

The unsettled state of the law is provoking confusion in the district courts.[6] State courts are similarly divided on how to address questions respecting classroom speech by teachers. *Compare LeVake* v. *Independent Sch. Dist. #656*, 625 N.W.2d 502, 508 (Minn. Ct. App. 2001) (rejecting First Amendment claim when "[plaintiff], in his role as a public school teacher rather than as a private citizen, wanted to discuss the criticisms of evolution"), *Green Township Educ. Ass'n* v. *Rowe*, 746 A.2d 499, 505 (N.J. Super. Ct. 2000) (striking down regulation of teacher speech because "its prohibitions are not invariably confined to the setting of the

---

[6] *See, e.g.*, *Cohen* v. *San Bernardino Valley College*, 883 F. Supp. 1407, 1414 (C.D. Cal. 1995) (reviewing judicial treatment of academic freedom and concluding that the "parameters of academic freedom are not distinct, particularly in relation to the potential conflict with a university's duty to ensure adequate education of its students"), *rev'd in part on other grounds*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997); *Silva v. University of N.H.*, 888 F. Supp. 293, 314-316 (D.N.H. 1994) (applying *Connick* and *Pickering* to determine that college professor's classroom speech related to matters of public concern while noting uncertainty that test was applicable).

school facility or classroom * * * [or] limited to situations in which students are present," but expressing "no doubt" that regulations applicable "in the presence of students while on school property could pass constitutional muster"), *Board of Educ. of Jefferson County Sch. Dist. R-1* v. *Wilder*, 960 P.2d 695, 702 (Colo. 1998) (en banc) (affirming termination of teacher for showing R-rated film to students as part of curriculum), *and Fisher* v. *Fairbanks North Star Borough Sch. Dist.*, 704 P.2d 213, 217 (Alaska 1985) (holding that control over instructional material rests with school board alone), *with Hosford* v. *School Comm. of Sandwich*, 659 N.E.2d 1178, 1182 (Mass. 1996) (concluding that refusal to rehire special needs teacher based on her pedagogical discussion of meanings of offensive words violated First Amendment), *and DiBona* v. *Matthews*, 269 Cal. Rptr. 882, 893-894 (Ct. App.) (holding First Amendment barred community college's cancellation of drama class based on teacher's intent to perform play containing vulgar language), *cert. denied*, 498 U.S. 998 (1990). Guidance is therefore required from this Court to resolve the extensive uncertainty pervading the lower courts.

II. THE QUESTION PRESENTED IS IMPORTANT AND SHOULD BE DECIDED BY THIS COURT

The conflict among the courts of appeals presented by this petition provides a compelling basis for plenary review, but the need for certiorari is heightened by the importance of the underlying issue. In *Connick*, this Court warned that if all matters within a government office are of public concern, then "virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." 461 U.S. at 149. The present case poses an analogous risk with respect to the classroom.

The ruling below has immediate repercussions for public schools throughout the Sixth Circuit. Since pedagogical classroom activities often involve speech that could be

argued to touch on areas of public concern, *see Urofsky*, 216 F.3d at 407, disgruntled teachers will more easily be able to transform run-of-the-mill employment disputes involving classroom performance into purported constitutional torts because schools will no longer be allowed an unfettered right to make content choices when acting as a speaker. *Cf. Rosenberger*, 515 U.S. at 833. Instead, they will have to share this right with their employees, for the panel opinion's recognition of an *individual* right to academic freedom is at the expense of the traditionally recognized *institutional* right. *Cf. Piarowski* v. *Illinois Cmty. College Dist. 515*, 759 F.2d 625, 630 (7th Cir.) ("If we hold that the college was forbidden to take the action it took to protect its image, we limit the freedom of the academy to manage its affairs as it chooses."), *cert. denied*, 474 U.S. 1007 (1985).

As a result, litigation burdens for public schools will greatly increase. When employment decisions based on classroom conduct are challenged, schools will be required to build a record to justify their hiring and firing choices against their employees' supposed rights to free expression in discharging their classroom duties. By broadening the range of cases that require a balancing of interests, the ruling below inevitably invites increasing judicial involvement into quotidian personnel management decisions by public institutions. Such interference stands to retard the political processes through which public oversight of educational institutions is normally maintained. *See Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 235 (2000) ("When the government speaks * * * it is, in the end, accountable to the electorate and the political processes for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.").

The *Pickering* framework is designed to minimize such intrusions. This Court has always recognized the importance of according government entities considerable latitude in controlling the workplace. "[T]he Government, as an em-

ployer, must have wide discretion and control over the management of its personnel and internal affairs." *Connick*, 461 U.S. at 151 (quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)); *see also Pickering*, 391 U.S. at 568 ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

Accordingly, this Court distinguishes between citizen speech that addresses a matter of public concern and employee speech that does not.

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering*'s progeny, reflects both the historical evolvement of rights in public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter. [*Connick*, 461 U.S. at 143 (footnotes omitted).]

The panel opinion disturbs this balance by treating expression that is clearly employee speech as touching on a matter of public concern. Lecturing students and conducting class discussion are the very essence of employment as an instructor at JCC or any other educational institution. *See also Cockrel*, 270 F.3d at 1052 ("[A]lthough plaintiff was speaking in her role as an employee when presenting information on the environmental benefits of industrial hemp, the content of her speech * * * most certainly involved matters related to the political and social concern of the community, as opposed to mere matters of private interest.").

The facts of this case are thus in stark contrast to those that motivated this Court to extend First Amendment protections to a teacher's letter to a local newspaper in *Pickering*. As the

Court took pains to explain, the letter was unrelated to the teacher's coworkers, his daily duties, or the school's operation. *Pickering*, 391 U.S. at 569-570, 572-573. In contrast, when the speech in question directly implicates a teacher's duties, as here, the school's regulatory interest is at its zenith. Nonetheless, under the Sixth Circuit's approach, a public institution's evaluation of such expression is subject to judicial second-guessing.

The Sixth Circuit sharply reduced the flexibility enjoyed by public employers to regulate those who speak on their behalf. To do so, the court employed reasoning that is directly contrary to decisions by other courts of appeals. And, as demonstrated by the plethora of reported opinions on this issue in virtually every circuit, the question presented is a recurring one that will not disappear. This Court should grant certiorari to harmonize the lower courts' treatment of the important issue presented by the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HOLLAND N. MCTYEIRE, V
MELISSA NORMAN BORK
GREENEBAUM DOLL
& MCDONALD PLLC
3300 National City Tower
101 South Fifth Street
Louisville, KY 40202
(502) 589-4200

JOHN G. ROBERTS, JR.*
JONATHAN S. FRANKLIN
MICHAEL R. GRYNBERG
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Petitioner